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PETROLIAM NASIONAL BHD

v.

PERWAJA STEEL SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[CIVIL SUIT NO: 22NCC-59-01-2013]
13 JUNE 2013

C ***CIVIL PROCEDURE:*** *Res judicata - Estoppel - Defences raised in earlier suit - Consent order recorded - Whether defendant allowed to raise identical defence in current proceedings*

D ***CIVIL PROCEDURE:*** *Parties - Locus standi - Gas supply agreement - Whether plaintiff privy to gas supply agreement - Whether plaintiff had locus to initiate action against defendant*

E ***CIVIL PROCEDURE:*** *Summary judgment - Application for - Whether triable issues existed - Whether plaintiff had locus standi - Whether identical defence in earlier suit raised in current proceedings - Whether res judicata applied*

F ***CONTRACT:*** *Construction - Agreement - Interim arrangement - Clauses in interim arrangement - Validity of - Whether interim arrangement valid after cut-off date and time - Construction of agreement - Whether court considered objective intention of parties - Whether subsequent agreement entered under duress - Whether computation of price agreed upon - Whether provisions of Competition Act 2010 contravened*

G There were two interlocutory applications that arose in this case. The first was the plaintiff's application for summary judgment under O. 14 of the Rules of Court 2012 and the second was the defendant's application for an interim injunction. Since 1984, the plaintiff supplied gas to the defendant without executing a formal agreement. In 2002, the plaintiff sought to formalise the agreement

H for the sale of dry gas to the defendant and the agreement was to expire on 31 December 2011. The defendant initialled each page of the draft agreement but maintained that the price of the supply of dry gas was not agreed upon. The parties then entered into a side letter dated 13 June 2002 which set out the agreed

I price for the supply of dry gas. In addition, the parties agreed to abide by the directives of the government of Malaysia with respect

to the applicable rates for the supply of dry gas. The defendants, however, defaulted in payments and the plaintiff initiated a suit against the defendant in 2009 ('the 2009 suit'). The matter was referred for mediation where the parties amicably resolved the suit by recording a consent order. Despite the consent order, the defendant continued to default in payments to the plaintiff. The plaintiff then issued a letter of demand to the defendant and exercised its contractual right to suspend the supply of gas to the defendant. The parties subsequently entered into an interim arrangement. The summary effect of the interim agreement was, *inter alia,* that: (i) a formal agreement to govern the sale and purchase for the supply of dry gas to be executed by 20 January 2012 which was also the cut off time of the interim arrangement; (ii) the defendant would pay the plaintiff RM7,581,035.47 by 20 January 2012; (iii) in the event that a formal agreement was not executed by the cut off date and the sum of RM7,581,035.47 was not paid, the plaintiff was entitled to terminate the supply of dry gas; and (iv) the sale and purchase of the dry gas would be governed by the terms and conditions as set out in Appendix A to the interim arrangement. As per the interim arrangement, the defendant had forwarded a cheque but it was not honoured by the bank. The defendant also failed to execute the agreement for the future supply of dry gas. As a result, the gas supply was duly discontinued on 28 January 2012 but after reaching an understanding, the supply was restored again on 30 January 2012. Notwithstanding this, the defendant failed to make the required payment and the plaintiff commenced legal proceedings in 2012. There was a further default of payment after the 2012 suit. In this summary judgment application, the defendant submitted on the ground that there were serious issues to be tried which warranted a full trial. Among the grounds raised by the defendant were: (i) that the interim arrangement was effective only till 20 January 2012; (ii) that the plaintiff had no *locus standi* to bring a cause of action against the defendant because the supply of gas was by Petronas Gas Berhad ('PGB') and not the plaintiff; (iii) that the interim arrangement was signed by the defendant under duress; (iv) that there were no agreement in relation to the price for the supply of dry gas; and (v) that the plaintiff acted in contravention of the Competition Act 2010. The plaintiff contended that the defendant was estopped by *res judicata* from re-litigating the same issues as the defence were identical to the 2012 suit. The plaintiff

A further contended that the court was bound to construe the validity of the interim arrangement on an objective basis and not to ascertain on the subjective intention of the parties. On the other hand, the defendant sought an injunction to maintain the *status quo* pending the disposal of the suit for the continued supply
B of dry gas. The defendant pointed out that it would likely suffer damages if the supply of gas was stopped completely and was not compensable in damages. The defendant also maintained that the plaintiff was duty bound to make such supply pursuant to the provisions to s. 13 of the Gas Supply Act 1993.

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Held (allowing plaintiff's application with costs; dismissing defendant's application):

(1) Although the second action was brought in respect of a fresh debt, the resurrection of identical defences which had been
D previously adjudicated and compromised upon were similarly caught and amounted to 'harassing' defences *vis a vis* the plaintiff's claim. The defences raised in 2012, being substantially similar to the present defence, ought not to be re-litigated. The fact that the defendant acceded to the entry
E of summary judgment indicated that the defendant conceded that there were no merits in the defence raised in the 2012 suit. Therefore, there should be no further re-litigation of these identical issues in the subsequent proceedings. In the circumstances, *res judicata* applied. (paras 35, 42 & 44)

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(2) There was nothing in the document which specified that Appendix A was only relevant until 20 January 2012. The fact that the agreement was labelled as an interim arrangement did not mean that it was limited to a particularly short time or
G that the duration expired on 20 January 2012. The oral evidence of the parties as to the subjective intention was irrelevant in interpreting the interim arrangement. The net result was that the interim arrangement subsisted or prevailed beyond the cut-off date and time. (paras 56 & 57)

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(3) Attachment A of the interim arrangement stated that PGB was a subsidiary of the plaintiff and the buyer was described as Perwaja Steel Sdn Bhd *ie*, the defendant. The contract was therefore between the plaintiff and the defendant and not with
I PGB. The fact that the invoices were issued by PGB and the dry gas was produced by PGB on behalf of the plaintiff could

not detract from the plaintiff's *locus* as the seller on this contract. As such, the issue of *locus standi* did not comprise a triable issue. (paras 61 & 63)

(4) No steps were taken to void the interim arrangement on the basis of duress. The plaintiff discontinued its supply of dry gas simply because the defendant had not paid the plaintiff over a significant period of time. This begged the question of whether the plaintiff was under the duty to supply dry gas to the defendant notwithstanding the defendants debt. This would be untenable in common sense and commercial perspective. Therefore, duress was not made out and did not comprise a triable issue. (para 65)

(5) The parties had agreed, by virtue of the interim arrangement, to the formula for the computation of the pricing as issued by the government of Malaysia. The defendant's plea to obtain dry gas at a reduced price was rejected by a specific committee and the price was maintained at industry sector price. Therefore, pursuant to the interim arrangement and the evidence as provided by the Economic Planning Unit, there was no inconsistency in relation to the price of the gas supplied. Since the defendant had made payment to the plaintiff in respect of the invoices issued by the plaintiff, the defendant was estopped by its conduct from alleging that there was no agreement between the parties on the issue of pricing. (paras 75-77)

(6) The matter under adjudication did not relate to the execution of the proposed Gas Sales Agreement but the recovery of monies due and owing to the plaintiff. The plaintiff had complied with the government directives in fixing the price for the supply of dry gas. The entire business of the plaintiff was regulated by the Petroleum Development Act 1974, subject to the control and direction of the Prime Minister whom may issue such direction as deemed fit. Therefore, the plaintiff was excluded from the application of Part II of the Competition Act 2010 by virtue of the second schedule of the Act and the alleged contravention did not arise. (paras 81-86)

A (7) The grant of the injunction sought would amount to granting the defendant the entire relief sought. The remedy under s. 53 of the Specific Relief Act 1950 was not applicable to the defendant since there was a debt due and owing to the plaintiff. There was also a contractual provision in the interim B agreement that allowed the suspension of gas. Section 14 of the Gas Supply Act 1993 was not applicable to the defendant neither did it make provision for the endless supply of dry gas without consideration for an infinite period of time. Although the suspension would cause irreparable loss in the form of loss C of profits and default on third parties, it did not merit on the factual matrix of the case that warrant the grant of a mandatory injunction. (paras 103, 108 & 109)

Case(s) referred to:

D *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***

Bank of Credit and Commerce International SA (in liquidation) v. Ali and Others [2001] 1 All ER 961 ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Investors Compensation Scheme Ltd v. West Bromwich Building Society E *[1998] 1 All ER 98* ***(refd)***

Johnson v. Gore Wood & Co [2001] 1 All ER 481 ***(refd)***

Joseph Paulus Lantip & Ors v. Unilever PLC [2012] 7 CLJ 693 FC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Harun Abdullah & 2 Ors [1995] 1 CLJ 293 CA ***(refd)***

F *Tinta Press Sdn Bhd v. Bank Islam (M) Bhd [1987] 1 CLJ 447; [1987] CLJ (Rep) 396 SC* ***(foll)***

Legislation referred to:

Competition Act 2010, s. 13

Gas Supply Act 1993, ss. 1(3), 14

G Rules of Court 2012, O. 14

Specific Relief Act 1950, s. 53

For the plaintiff - S Suhendran (Sanjay Mohan & K Govinath with him); M/s Kadir Andri & Partners

For the defendant - Paul Ong (Gabriel Daniel with him); M/s Paul Ong & H *Assocs*

Reported by Sandra Gabriel

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JUDGMENT

Nallini Pathmanathan J:

Introduction

[1] There are two interlocutory applications that fall for adjudication in this matter. The first is the plaintiff's application for summary judgment under O. 14 of the Rules of Court 2012. The second is the defendant's application for an interim injunction.

[2] The plaintiff, Petroliam Nasional Bhd ('plaintiff') by virtue of the Petroleum Development Act 1974 is vested with the entire ownership in and exclusive rights, powers and privileges in respect of petroleum in the country. A portion of the plaintiff's business involves the extraction and processing of gas. In this context the plaintiff pleads that its subsidiary, Petronas Gas Berhad ('PGB') operates and manages the processing and transmission of gas within Malaysia. In order to do so PGB operates a gas transmission pipeline network including metering stations, related equipment and pipelines.

[3] The defendant owns and operates a direct reduction plant and steel mill at Telok Kalong Industrial Estate in Kemaman, Terengganu. It requires a constant supply of dry gas for the manufacturing process of direct reduction plant and steel operations. Until 17 March 2003 the defendant was wholly owned by the government of Malaysia. Thereafter it was privatised and its shares listed on Bursa as of 20 August 2008.

[4] The background facts leading up to this dispute are not in dispute. From about 1984, the plaintiff supplied gas to the defendant without the benefit of a formal written agreement.

[5] In or around 2002, the plaintiff sought to formalise the agreement for the sale of dry gas to the defendant. The plaintiff maintains that an agreement was entered into with the defendant for the sale of dry gas. The agreement was to expire on 31 December 2011. The plaintiff maintains that consensus was reached between the plaintiff and the defendant as evidenced by the fact that the defendant initialled each and every page of the draft agreement save for one page containing the articles relating to the formula for the calculation of the applicable rate or pricing.

[6] The defendant however disagrees, maintaining that while the agreement was initialled it was not signed at the signing page and the price was not agreed upon. As such the defendant maintains that the agreement was inchoate. The defendant was of the view that the written agreement proposed by the plaintiff on the terms set out therein was not necessary. To this end the defendant pointed to the fact that it had purchased dry gas throughout the years without an agreement on such terms. (This issue is not relevant to the current dispute). As the pricing was not agreed upon the parties entered into a 'side letter' dated 13 June 2002 which set out the agreed price for the supply of dry gas. The plaintiff further maintains that the parties had, in addition thereto agreed to abide by the directives of the government of Malaysia (as expressed by the Cabinet) with respect to the applicable rate for the supply of dry gas.

[7] The plaintiff continued to supply dry gas to the defendant. However the defendant failed to make payment for such supply as a consequence of which the plaintiff initiated a suit against the defendant on 27 April 2009 ('the 2009 suit'). The matter was referred for mediation and the parties resolved the 2009 suit amicably by recording a consent order on 14 October 2011.

[8] Notwithstanding this consent order, the plaintiff maintains that the defendant continued to default in making payment to the plaintiff for the dry gas that had been supplied. On 8 November 2011 the plaintiff issued a letter to the defendant demanding for payment of the sum of RM57.3 million. The defendant issued a cheque in payment for the same on 30 November 2011 which was dishonoured.

[9] The plaintiff then issued a letter dated 9 December 2011 advising the defendant of the dishonour and further giving notice to the defendant that it would be exercising its contractual right to proceed to suspend the supply of dry gas to the defendant.

[10] The plaintiff and the defendant reached an agreement on 12 December 2011 where it was agreed that the supply of dry gas would not be suspended if the defendant immediately made payment of 10% of the sum of RM57.3 million and the remaining 90% was to be paid by 24 December 2011. This was recorded by the defendant *vide* its letter of 31 December 2011.

[11] On 14 December 2011 the plaintiff reminded the defendant of its having agreed to execute the agreement for the future supply of gas by 29 December 2011 as the earlier agreement was due to expire on 31 December 2011.

[12] The defendant paid the initial 10% but defaulted on the remaining 90%. As a result, the plaintiff issued a letter to the defendant on 30 December 2011 informing the defendant that its cheque for the balance sum of 90% had not cleared. Additionally the plaintiff maintained that as the defendant had not signed the proposed agreement for the future supply of gas, this amounted to confirmation that the defendant did not want the supply of dry gas to be continued. As such the plaintiff did not supply dry gas to the defendant beginning from 1 January 2012.

[13] The supply of gas was resumed on 7 January 2012 as payment for the sum of RM69.5 million was made on 5 January 2012. On 6 January 2012 the parties entered into an interim arrangement, the salient parts of which read as follows:

> This letter records the agreement of Petronas and Perwaja on the following matters:
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> 1. A formal written agreement to govern the sale and purchse of dry gas between the parties from 1 January 2012 shall be in place for the supply of dry gas to Perwaja and therefore a draft of the new Gas Sales Agreement ('GSA') had been previously provided to Perwaja and the parties intend to finalise and execute the GSA on or before five (5) p.m. on 20 January 2012 ('Cut-off Date and Time').
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> 2. Perwaja shall pay to Petronas:
>
>   (a) the sum of RM7,581,035.47(...) Being the total principal amount which is outstanding and over due to Petronas as of 31 December 2011 for the supply of dry gas to Perwaja; and
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>   (b) Any and all sums payable to Petronas for the supply of dry gas to Perwaja as and when such sums become due without any set-off or counterclaim.
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> 3. Petronas shall commence the supply of dry gas to Perwaja at six a.m. on the day immediately following the day on which Petronas receives Perwaja's indication of acceptance of the terms of his letter in the form of the Acknowledgement

A and Acceptance attached hereto which is sent to you in duplicate, whereupon the sale and purchase of dry gas pursuant thereto shall be governed by the terms attached hereto as Appendix A whereby:

B (a) This letter shall be construed as part of the documents that constitute the entire agreement and understanding between the parties as specified in Article 25.1 of Attachment A;

C (b) notwithstanding Article X of Attachment A, the price of Dry Gas in RM per Million British Thermal Unit (MMBTU) for Dry Gas supplied under this interim arrangement, until six (6) a.m. on 21 January 2012 is RM18.35/MMBTU;

D (c) Article VI of Attachment A shall not be applicable for Dry Gas supplied under this interim arrangement; and

(d) in the event of any inconsistency between the terms contained herein and the terms contained in Appendix A, the terms herein shall prevail.

E 4. Petronas will have the right and discretion to discontinue the supply of dry gas to Perwaja at six (6) a.m. on 21 January 2012 or at any time thereafter, in the event:

(a) the GSA is not executed by Perwaja; or

F (b) Petronas does not receive full payment of the sum mentioned in paragraph 2(a) above, on or before the Cut-Off Date and Time.

5. This letter shall be governed by the laws of Malaysia. Notwithstanding the foregoing, Petronas reserves its rights in
G this matter...

[14] In summary the effect of the interim agreement was, *inter alia*, as follows:

H (a) That a formal agreement to govern the sale and purchase for the supply of dry gas was to be executed by 5pm on 20 January 2012, which date and time were described in the interim arrangement as the 'cut-off date and time';

I (b) That the defendant would pay the plaintiff the sum of RM7,581,035.47 by 5pm on 20 January 2012.

(c) That in the event the formal agreement was not executed by the cut-off date and time, or in the event the plaintiff was not paid the sum of RM7,581,035.46 by the stipulated date, the plaintiff would be entitled to terminate the supply of dry gas to the defendant; and

(d) The sale and purchase of the supply of dry gas would be governed by the terms and conditions as set out in Appendix A to the interim arrangement.

[15] The interim arrangement was duly executed by the Chief Executive Officer of the defendant.

[16] On 20 January 2012 the defendant forwarded a cheque for the requisite sum as stated in the interim arrangement but it was not honoured by the bank. The defendant also failed to execute the agreement for the future supply of dry gas. As such the plaintiff wrote to the defendant stating, *inter alia,* that as the defendant had failed to adhere to the terms of the interim arrangement and as the supply of dry gas from 1 January 2012 was subject to compliance with the two conditions set out in the interim arrangement which had been breached, the supply of dry gas would be discontinued from 6am on 28 January 2012. The gas supply was duly discontinued on 28 January 2012.

[17] On 30 January 2012 the supply of gas was restored on the understanding that the defendant would make payment of the outstanding sums due and owing as at 31 January 2012 and that the defendant would enter into a new agreement by 24 February 2012.

[18] Notwithstanding this the defendant failed to make payment promptly. The plaintiff issued a letter on 5 March 2012 recording that the outstanding amount stood at RM26,042,779.13. There was no response. As of 6 April 2012 the amount outstanding had increased to RM45,287,164.46. The plaintiff gave the defendant due notice that it would commence legal proceedings for recovery of the debt due and owing to it.

[19] As of 31 May 2012 the defendant owed a sum of RM62,718,101.31 to the plaintiff.

A **The 2012 Suit**

[20] On 13 June 2012 the plaintiff filed the 2012 suit claiming a sum of RM62,718,101.31 as at 31 May 2012. The plaintiff filed an application for summary judgment against the defendant on 25 B September 2012. It was heard by this court. Having heard the application this court entered summary judgment in the 2012 suit for the sum of RM37 million on the basis that there was no dispute in respect of that sum. The balance was referred to trial. However the parties entered into a consent judgment for the C balance sum due and owing.

The Period After The 2012 Suit

[21] After this there was further default. The plaintiff contends that the defendant has failed to make payment for the supply of D dry gas from 3 May 2012 until 26 November 2012 which amounts to a sum of RM146,138,690.52 as at 31 December 2012 without interest. The plaintiff maintains that this amounts to a breach of the interim arrangement which requires the defendant to make payment in respect of such supply within 30 days of the issuance E of the plaintiff's invoice.

Alternatively the plaintiff contends that it has supplied and continues to supply dry gas to the defendant at the prices as determined by the government. Such supply has been accepted F and the defendant has been invoiced periodically. However the defendant has simply failed, neglected or refused to make payment for the gas supplied while continuing to demand an uninterrupted supply of dry gas.

G **The Summary Judgment Application**

[22] As such the plaintiff seeks summary judgment against the defendant in the sum of RM146,138,690.52 as at 31 December 2012 together with interest amounting to RM10,313,397.45 as at 10 January 2013 and interest at the rate of 3.5% above the base H lending rate quoted by Maybank Banking Berhad from 11 January 2013 until full payment.

[23] The defendant resists the plaintiff's application for summary judgment maintain that there are serious issues to be tried which I warrant the dispute being resolved only after a full trial of the

matter. The defendant has filed defence and counterclaim setting out its grounds in full. The defendant contends that the following matters comprise 'triable' issues:

(i) That the interim arrangement is only effective up to 20 January 2012, ie, the cut-off date, and not thereafter.

(ii) The issue of *locus standi* - in this context the defendant points to the fact that the supply of gas is by Petronas Gas Bhd, while the party initiating the action here is the plaintiff, Petroliam Nasional Bhd. Accordingly the *locus* of the plaintiff to initiate this action is challenged;

(iii) That the interim arrangement was signed by the defendant's chief executive officer under duress;

(iv) That there is no agreement between the parties in relation to the price for the supply of dry gas; and

(v) The plaintiff has acted in contravention of the Competition Act 2010 in fixing the price for the supply of dry gas to the defendant.

[24] With respect to the interim arrangement, which comprises the primary basis for the plaintiff's claim, the defendant contends that while it does not dispute the subsistence of the interim arrangement, the interim arrangement does not, and cannot, survive beyond the cut-off date and time, ie, 20 January 2012. The defendant so maintains because it emphasises that such an arrangement was meant to be purely interim and should therefore be read within the context of the time frame stipulated there, namely the cut-off date and time. The issue of the proper construction of the provisions of the interim arrangement, it is contended on behalf of the defendant, is a matter more properly dealt with at trial when the full factual matrix can be set out and the interim arrangement construed in that context. As such the defendant maintains that this construction, namely whether the interim arrangement was meant to survive or prevail beyond the cut-off date and time is a 'triable' issue.

[25] The plaintiff, needless to say maintains to the contrary that the construction of the interim arrangement is largely a matter of law to be construed by the court objectively. More significantly

the plaintiff points to the fact that there are no factual issues in dispute that warrant the matter proceeding to trial. This issue will be dealt with further on in the judgment.

[26] It is also pertinent to state that the defendant maintains that it cannot to date agree to the execution of a gas sales agreement by reason of what it terms the 'unreasonable' and 'oppressive' conditions imposed upon it by the plaintiff. Hence no gas sales agreement has been executed to date. Notwithstanding this, the plaintiff has continued to supply gas without interruption until a short time before the hearing of this application. As matters currently stand the defendant is being supplied with half its normal quantum or volume of gas. This in turn has led to the defendant seeking an injunction to direct the plaintiff to resume full supply once again. (That application will be considered after this application for summary judgment has been dealt with).

[27] The foregoing sets out the factual matrix of the claim as well as the issues in dispute between the parties. Each of these matters will be considered in turn.

Issue 1: *Res Judicata* Or Issue Estoppel

[28] As a preliminary issue and in response to each and every allegation raised by the defendant the plaintiff submits that the plea of *res judicata* is available to it to meet each and every 'triable' issue raised by the defendant.

[29] In support of this contention the plaintiff refers to the fact that the defence filed by the defendant here are the same defences raised in the 2012 suit and in response to the application for summary judgment in the 2012 suit. The plaintiff further submits that the plaintiff's application for summary judgment in the sum of RM37,908,908.98 was allowed while the balance sum of RM21,809,192.33 was set for trial as there was a counterclaim for wrongful suspension. However that balance sum was subsequently paid by the defendant. In the current suit the counterclaim is for damages for a breach of the Competition Act. There was no appeal filed.

[30] As the defences filed in the 2012 suit are virtually identical to the defences raised in the current suit, the plaintiff submits that the defendant is estopped by *res judicata* from re-litigating the same

issues in this Honourable Court. It is further submitted for the plaintiff that matters that were settled pursuant to a settlement agreement and the subject of a compromise, as was the case here for the balance sum, is also subject to an issue estoppel.

[31] The defendant however maintains in response that *res judicata* is not applicable here because the current suit comprises a fresh cause of action. Further it is submitted for the defendant that the summary judgment for the sum of RM37 million odd was entered into without a full ventilation of the issues raised here because the said sum was held by the plaintiff's solicitors as stakeholders at the time of that summary judgment application. The balance sum was settled. As such the defendant maintains that *res judicata* does not come into play here, primarily because there was not a full adjudication of each and every issue raised. Further the defendant argues that in the absence of the full notes of proceedings and grounds of judgment it is not open to the plaintiff to rely on *res judicata* as it is not possible to undertake a full examination of precisely what was adjudicated upon in the 2012 suit.

[32] It is not in issue that the defences filed in the 2012 suit are similar to, if not identical to the defences filed here. Although summary judgment for the RM37 million was entered into without a full adjudication on the merits of each and every limb of the defence and counterclaim filed by the defendant, this was largely because the defendant acceded to or accepted liability for the said sum. This was borne out by the fact that the said sum was placed in a stakeholder's account and represented the sum which the defendant accepted at the outset as its liability. Hence the judgment granted at the summary judgment stage. The balance sum did not need to be adjudicated at trial because the defendant compromised the claim or settled it prior to trial. In short the defendant settled the entire claim of the plaintiff save for the interest element. It is in this context that the plaintiff submits that having acceded to judgment in the 2012 suit, where the defences are similar or identical to the defences raised here the defendant maintains that issue estoppel comes into play to preclude the defendant from trying to relitigate matters which it accepted liability for in the previous suit. In other words, the defendant in this suit seeks to re-litigate issues which it had previously compromised and accepted as its liability in the 2012 suit. It is

A significant to note that what gives rise to the invocation of the doctrine of *res judicata* or issue estoppel is the fact that the defences raised in the current suit are identical to those raised in the 2012 suit. As a consequence the issues that arise in that suit and the current suit are identical. Summary judgment was entered B in the 2012 suit for RM37 million odd on the basis that there was no dispute to that sum. It follows that there was therefore no dispute on the liability to pay under the interim agreement notwithstanding defences to the contrary. As judgment was accorded for the greater part of that suit and the balance C compromised, it follows that those issues were resolved in the plaintiff's favour. As such the plaintiff's contention is that the defendant is estopped by *res judicata* or issue estoppel from raising these defences or any other defence that could have been raised to resist liability under the interim arrangement. The issue of the D tenure or validity of the interim arrangement was therefore, it is contended, determined finally in that suit as a consequence of both the summary judgment and the compromise.

[33] Those same issues are now being raised here once more. E Is it then open to the plaintiff to rely on *res judicata* or issue estoppel to maintain that the defendant is estopped from re-litigating the same issues in this court by reason of the judgment and compromise in the 2012 suit?

F **The Law On *Res Judicata***

[34] In *Joseph Paulus Lantip & Ors v. Unilever PLC [2012] 7 CLJ 693* Arifin Zakaria CJ considered the circumstances in which the doctrine of *res judicata* applies (at paras. 29-34 of the judgment at G pp. 706-708 of the judgment):

> ... What is meant by *res judicta* was well explained in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783 where Peh Swee Chin FCJ in delivering the judgment of the court stated:
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> > What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicature*. When a matter between two parties has been adjudicated by a Court of competent jurisdiction the parties and their privies are not permitted to litigate once more the I *res judicata*, because the judgment becomes the truth between such parties, or in other words the parties should accept it

> as the truth; *res judicata pro vertiate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation – interest *rei publicae ut* finis litium. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

See also the case of *Kandiah Peter Kandiah v. Public Bank* [1993] 4 CLJ 332.

Thus for the doctrine of *res judicata* to apply, the same issue must have been raised and decided in an earlier proceeding or action in which the parties are represented. And for that reason it is not open for the same issue to be litigated afresh between the same parties. This doctrine is based on the public policy that there must be finality and conclusiveness in judicial decisions and the right of the individual from being vexed by multiplicity of suits at the instance of an opponent. In *Satyadhan Ghosal and others v. Smt. Deorajin Debi And Another* 1960 AIR SC 941, the Indian Supreme Court stated the principle as follows:

> (7) The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter –whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.
>
> ... The parties are bound by the rulings of the court under the principle of *res judicata*. It is also important to observe that a decision given by a court at one stage on a particular issue is binding on it at a later stage in the same or subsequent suit.

[35] It would appear from a perusal and application of the foregoing that *res judicata* would apply on the facts of this case. The issue of the defendant's liability was decided or determined in the 2012 suit, partly by adjudication and partly by compromise. The same or identical issue arises here. The parties are identical.

A It would follow from an application of the foregoing principle as enunciated above that neither the plaintiff nor the defendant here are allowed in these or future proceedings to canvass the same issues as they did in the 2012 suit.

B **[36]** The defendant however argues that there had to be an adjudication on the merits of these defences before *res judicata* could apply. Is such adjudication necessary before this doctrine can apply?

C **[37]** The decision of the House of Lords in the English case of *Johnson v. Gore Wood & Co* [2001] 1 All ER 481, is instructive. In that case the House of Lords had occasion to examine the issues of *inter alia*, abuse of process, *res judicata* and issue estoppel. A chronology of the evolution of the law relating to this area was considered in detail commencing with the renowned passage of Sir James Wigram V-C in *Henderson v. Henderson* (1843) 3 Hare 100 at 114-115 [1843-60] All ER where he said:

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> In trying this question I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the
E subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought
F forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies except in special cases not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment but to every point which
G properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[38] The judgment makes a distinction between cases where issues or points are expressly brought before the court for its
H adjudication, ie, the narrow definition of *res judicata*, and secondly matters which the parties ought to have brought before the court for adjudication if they had exercised reasonable diligence (the broad or wider scope of *res judicata*). This two tiered definition has been skillfully, if I might respectfully say, famously set out in *Kawal*
I

Teliti by Peh Swee Chin FCJ (as cited above). The instant case relates to the first tier, namely issues that were directly before the court and comprised the subject matter of adjudication.

[39] Lord Bingham of Cornhill in *Johnson v. Gore-Wood* (above) went on to consider the underlying rationale for the doctrines of *res judicata*, issue estoppel and abuse of process:

> It may very well be, as has been convincingly argued (watt' The Danger and Deceit of the Rule in *Henderson v. Henderson*: A new approach to successive civil actions arising from the same factual matter' (2000) 19 CQJ287), that what is now taken to be the rule in *Henderson v. Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*. But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all ...

[40] Lord Bingham went to consider the approach to be adopted where a matter which could have been raised in earlier proceedings was not and sought to be raised in subsequent proceedings. The issue was whether this amounted to an abuse without more, or whether it warranted a further consideration or investigation in all the circumstances of a particular case. The court concluded that the latter was the correct approach. However this is not directly relevant here as what is being considered is not whether a defence that could have been raised earlier was not raised but is sought to be raised in the current proceedings. What is being considered here is whether similar or identical issues expressly raised in previous proceedings may be raise again in subsequent proceedings. This, as stated previously falls within the narrow definition of *res judicata*.

[41] However the primary bone of contention on the part of the defendant is that there was not a full adjudication on the merits of the defence but a compromise. Therefore it is suggested that *res judicata* does not arise. This argument was also put forward in *Johnson v. Gore Wood & Co* (above) and rejected:

> The second subsidiary argument was that the rule in Henderson v. Henderson did not apply to Mr. Johnson since the first action against GW had culminated in a compromise and not a judgment. This argument also was rightly rejected. An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.

[42] Although in the instant case the second action is brought in respect of a fresh debt the resurrection of identical defences which have been previously adjudicated and compromised upon, are similarly caught as amounting to 'harassing' defences *vis a vis* the plaintiff's claim, to my mind.

[43] It is important to note that in the same judgment Lord Millett also took the view that the compromise or settlement of an action out of court could attract the application of the doctrine of *res judicat*a. After having referred to the passage by Wigram V-C in *Henderson v. Henderson* he said:

> ... As the passages which I have emphasised indicate, Sir James Wigram V-C did not consider that he was laying down a new principle, but rather that he was explaining the true extent of the existing plea of *res judicata*. Thus he was careful to limit what he was saying to cases which had proceeded to judgment, and not, as in the present case, to an out of court settlement. Later decisions have doubted the correctness of treating the principle as an application of the doctrine of *res judicata*, while describing it as an extension to the doctrine or analogous to it ...
>
> In one respect, however, the principle goes further than the strict doctrine of *res judicata* or the formulation adopted by Sir James Wigram V-C, for I agree that it is capable of applying even where the first action concluded in a settlement.

[44] It would appear from a consideration of all the cases above that the doctrine of *res judicata* is applicable in the instant case given the full factual matrix which is not in dispute. The defences raised in the 2012 being substantially similar or identical to the present defences ought not to be re-litigated as these issues were adjudicated upon in the summary judgment application and by way of compromise of the entire suit in respect of the balance sum. The fact that the defendant here acceded in effect to the entry of summary judgment indicates that the defendant itself conceded that there were no merits in the defences raised in the 2012 suit. As judgment was entered, there was a determination of those issues in the plaintiff's favour. There should therefore be no further relitigation of these identical issues in these subsequent proceedings. For these reasons, I concur with learned counsel for the plaintiff that *res judicata* comes into play precluding the defendant from raising these identical defences afresh in the instant suit. The net result of such a finding is that the plaintiff is entitled to summary judgment as prayed for in respect of the principal sum claimed namely RM146,138,690.52.

[45] However in the event I am incorrect in my analysis of the doctrine of *res judicata* and issue estoppel, I proceed to consider each of the defences raised by the defendant to ascertain whether they amount to 'triable' issues.

Issue (2): The Validity And Tenure Of The Interim Arrangement

[46] The terms of the interim arrangement have been fully set out above. The defendant submits in essence that the interim arrangement has expired and that the plaintiff cannot therefore rely on the terms of the same to recover monies for the supply of dry gas or to suspend supply of dry gas. The defendant points to the fact that cl. 1 of the interim arrangement anticipates the finalisation of a gas supply agreement which means that parties were intended to negotiate and arrive at mutually acceptable terms. The defendant maintains that it was unable to agree to the terms proposed by the plaintiff which it deemed unfair. That, the defendant submits, is the basis for the interim agreement which was to expire as of the cut-off date specified, namely 20 January 2012. The interim arrangement has therefore to be construed within the context of that cut-off date. The defendant further

maintains that if indeed the interim agreement was intended to prevail after the cut-off date of 20 January 2012 that ought to have been made clearer. It was prepared by the plaintiff and therefore ought to have been drafted more clearly. The defendant also seeks to invoke the *contra proferentum* rule against the plaintiff, maintaining that the document is equivocal in relation to the tenure of the interim arrangement. The defendant submits that the issue of the construction of the interim arrangement comprises a 'triable' issue which warrants the reference of this entire suit to trial for ventilation.

[47] The plaintiff on the other hand submits that the interim arrangement does not specify any expiry date. It maintains that a perusal of the interim arrangement clearly indicates that it is to bind parties until the execution of a new supply agreement. Further the plaintiff submits that the defendant is estopped from challenging the validity of the interim arrangement as the defendant continues to receive a supply of dry gas from the plaintiff to date, pursuant to the terms of the interim arrangement.

[48] Finally on the issue of the interpretation or construction of the interim arrangement, more particularly in relation to the need to have the matter dealt with by way of a full trial, the plaintiff submits that the court is bound to construe the interim arrangement on an objective basis and not to ascertain the subjective intention of the parties. To that extent the oral evidence of the parties as to the subjective intention of each party is irrelevant.

[49] A perusal of the interim arrangement discloses in cl. 1 that the parties agreed that a formal written agreement for the supply of dry gas from 1 January 2012 was to be achieved by the cut-off date and time. Clause 2 provides for the payment of RM7.5 million odd by the defendant to the plaintiff while cl. 4 specifies that such payment is to be made in full by the cut-off date and time. Clause 3 provides for the recommencement of dry gas supply upon the receipt of the acceptance by the defendant of the terms of the interim arrangement.

[50] The letter setting out the salient terms is to be construed as part of the full proposed agreement set out as attachment A to the interim agreement. The plaintiff retained the right and discretion to discontinue the supply of dry gas by 6am on

21 January 2012 or at any time thereafter in the event the gas sales agreement was not executed by the defendant by the cut-off date or if the monies owed to it were not paid by that date.

[51] The interim agreement was duly acknowledged and accepted by the defendant. The acceptance specifically provides that the defendant has considered the terms and conditions of the interim arrangement including attachment A and finds it reasonable and agrees to be bound by the same. The acceptance was signed by the chief executive officer of the defendant on 6 January 2012.

[52] The issue that arises for consideration is whether it is possible to construe or ascertain the tenure of the interim arrangement from a perusal of the four corners of the agreement (including attachment A) or whether it is necessary to have this matter adjudicated at trial because there is a need for oral evidence to explain the contents of the interim arrangement.

[53] The law in relation to the construction of agreements has been comprehensively set out in the English House of Lords decision of *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98. In that case Lord Hoffman summarised the principles of interpretation of a contractual, particularly a commercial document such as a contract thus:

> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase, is if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in*

ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945).

(5) *The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.* Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v. Salen REderierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

> if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense. (emphasis added).

[54] These principles were followed in the House of Lords case of *Bank of Credit and Commerce International SA (in liquidation) v. Ali and Others* [2001] 1 All ER 961 ('*BCCI* case') where Lord Bingham stated as follows:

> I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. *To ascertain the parties'*

intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Society* [1998] 1 All ER 98 at 114-115, [1998] 1 WLR 896 at 912 – 913 apply in a case such as this. (emphasis added).

[55] The foregoing principles are to be applied to the issue here, namely whether the issue of the validity of the interim arrangement expires as of the cut-off date or not, and whether this issue needs to be ventilated at trial.

[56] Having perused the interim arrangement is evident on a plain reading of the same that:

(i) The cut-off date and time (ie, 20 January 2012) in the interim arrangement dated 6 January 2012 relates peculiarly to cl. 1, 2 and 4 of the interim arrangement rather than as a timeline for the duration of the agreement itself. This is borne out by the fact that the cut-off date and time are relevant specifically as timelines for the execution of the proposed gas sales agreement, the payment of the RM7.5 million odd, as well as when the right to discontinue the supply of dry gas accrues. The difference in time between the interim arrangement and the cut-off date is two weeks, which was the length of time accorded to procure the execution of the proposed agreement and the payment of outstanding monies. The cut-off date does not delineate the duration of the agreement.

(ii) Clause 3 specifically provides that upon acceptance of the terms of the interim arrangement, the plaintiff was to recommence the supply of dry gas, after which the sale and purchase of dry gas would be governed by appendix A. It follows from this therefore that the arrangement with regard to the future supply of dry gas was agreed between the parties to be governed by appendix A, which is a lengthy document setting out details relating to the future supply of gas. As such it follows that the parties agreed that the terms of the supply of dry gas beyond the cut-off date and time would be as specified in appendix A. There is nothing in the document which specifies that appendix A is only relevant for the duration of time until the cut-off date, ie, 20 January 2012.

(iii) There is nothing in the interim arrangement *albeit* in the heading or content that links the cut-off date with the duration of the agreement. It follows that the duration is not therefore specified. The fact that the agreement is labelled an interim arrangement does not mean that it is limited to a particularly short time or that its duration expired on 20 January 2012.

(iv) Clause 4 of the interim arrangement also clearly provides that the plaintiff retained the right and discretion to discontinue the supply of dry gas to the defendant by a specified date or, significantly, at any time thereafter, if the conditions of the interim arrangement were not met. This right to discontinue was clearly retained beyond the cut-off date.

[57] The foregoing matters are apparent on a perusal of the interim arrangement in the context of the factual background and history of the dispute between the plaintiff and the defendant. The net result is that it is clear that the interim arrangement subsists or prevails beyond the cut-off date and time.

[58] I am able to so conclude without this matter going to trial because:

(a) The history of the dispute or the chronology of events is not in issue in this case. Even if there are some details in dispute, these matters are not relevant for the purposes of ascertaining whether the duration of the interim arrangement is up to the cut-off date or beyond that date;

(b) As specified in the case law above, there would be no useful purpose served by calling for oral evidence on this issue, as each party so summoned to testify would simply put forward his or her subjective understanding and seek to persuade the court to adopt such subjective intent. As stated in the BCCI case by Lord Bingham, to ascertain the parties' intentions the court does not inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. Those materials are before the court and not in dispute in relation to this issue; and

(c) The factual background or matrix of this case is neither complex nor warrants the calling of oral testimony. It is simply a claim for a debt due and owing for the supply of dry gas, the supply of which is not in dispute. One of the main issues before the court is the duration of the interim arrangement which is essentially a question of a construction of the contract. In view of the lack of dispute as to the factual chronology of events this is essentially a question of law which can be determined on a consideration of the contract, the factual background and an application of the correct principles of law on construction of a commercial contract.

[59] I therefore conclude that the issue of the duration of the interim arrangement is not a 'triable' issue. I also conclude for the reasons stated above that the interim arrangement prevails or subsists beyond the cut-off date and time.

Issue (3): *Locus Standi* Of The Plaintiff To Initiate This Action

[60] The defendant points to the fact that all invoices issued in respect of the dry gas supplied have been issued by Petronas Gas Bhd and not the plaintiff. The defendant therefore maintains that the contract is between Petronas Gas Bhd and the defendant and not the plaintiff and the defendant. Further the defendant maintains that upon default it is Petronas Gas Bhd that must sue, and not the plaintiff. It is submitted that the plaintiff has no right to sue.

[61] The plaintiff responds by pointing to the interim arrangement, which contains attachment A which sets out the terms on which dry gas was to be supplied to the defendant. In that document, the seller is described as Petroliam Nasional Bhd, ie, the plaintiff, while the buyer is described as Perwaja Steel Sdn Bhd, the defendant. The contract is therefore between the plaintiff and the defendant. In this attachment Petronas Gas Bhd is described as follows:

> PGB is a subsidiary of the Seller which owns and operates a Gas Processing Plant(s) at Kerteh, Terengganu to process, *inter alia* Dry Gas from the gas produced from the Gas Production Area into Dry Gas. PGB also owns and operates a trans-peninsular natural gas transmission pipeline network, in Malaysia including metering stations, related equipment and pipelines.

[62] Article II of the attachment provides that the seller agrees to sell and deliver to the buyer at the delivery point and the buyer agrees to purchase receive and pay for dry gas processed from natural gas.

[63] It is apparent from the foregoing that the contract in dispute here is between the plaintiff and the defendant and not PGB and the defendant. Moreover a perusal of the invoices issued by PGB expressly require that payment be made to the plaintiff. In other words the fact that invoices are issued by PGB and dry gas is produced by PGB on behalf of the plaintiff does not, and cannot detract from the plaintiff's *locus* as the seller in this contract. As such the issue of *'locus standi'* does not comprise a 'triable' issue.

Issue (4): Economic Duress

[64] The defendant contends that the interim arrangement was entered into by the defendant as a result of economic duress as the plaintiff had 'in an unwarranted and underhanded manner' shut down the supply of gas to the defendant's plant on two occasions in an attempt to compel the defendant to execute the proposed gas supply agreement. In essence therefore the defendant relies on the fact of the discontinuance of supply of gas on two occasions to substantiate its claim of duress. No other elements of duress are set out or particularised.

[65] No steps were taken at any stage to void the interim arrangement after its execution on the basis of duress. In fact the plaintiff supplied and the defendant accepted and utilised the dry gas. It also accepted and made good the invoices issued by the plaintiff thereafter. In these circumstances the assertion of 'duress' appears to lack any substantive basis. The plaintiff discontinued its supply of dry gas simply because it had not been paid over a significant period of time. This begs the question of whether the plaintiff is under a duty to continue to supply dry gas notwithstanding the size or quantum of the defendant's debt? From a common sense and commercial perspective this is simply untenable. Duress is not therefore made out and this too does not comprise a 'triable' issue.

Issue (5): That There Is No Agreement Between The Parties In Relation To The Price For The Supply Of Dry Gas

[66] The defendant submits that there is no agreement between the parties in relation to the price for the supply of gas. Further the defendant also submits that there are inconsistencies in the prices or tariffs imposed by the plaintiff on the defendant.

[67] As stated in the course of the chronology the history of the supply of dry gas by the plaintiff to the defendant commenced in 1984 without the benefit of a formal agreement. In 2002 an attempt was made to formalise the agreement as explained above. However no agreement was reached on the mode of calculating the applicable price. The parties then entered into the 'side letter' of 13 June 2002 where the applicable price of dry gas was agreed at RM6,68 per million British Thermal Unit (MMBTU) with an annual escalation of 2% to take effect from June 2002. The parties also agreed to abide by the directives of the government of Malaysia with respect to the applicable rate for the supply of gas. All of this is not directly relevant to the current dispute.

[68] With the advent of the interim agreement (which I have concluded is valid and subsisting) the parties agreed that up to and until 21 January 2012, the cost of dry gas supplied would be RM18.35/MMBTU as borne out by cl. 3(b) of the interim arrangement.

[69] After that date the price of dry gas is governed by attachment A as is borne out by cl. 3 of the interim arrangement that provides *inter alia* that upon receipt of the acceptance of the agreement

> ... whereupon the sale and purchase of dry gas pursuant thereto shall be governed by the terms attached hereto as Appendix A ...

[70] Article X of appendix A deals with price. Article 10.1 provides that the price of dry gas is to be paid at the rate stipulated in appendix 1. Appendix 1 sets out a formula for the computation of the price of dry gas.

[71] Article 10.2 stipulates that the seller ie, the plaintiff may by written notice to the buyer, ie, the defendant, amend the terms of art. 10.1 in any manner that it deems fit in order to implement any further instructions or directive issued from time to time by

A the government of Malaysia or its representative (which shall include but not be limited to the economic planning unit or its successor-in-title) to the plaintiff in respect of regulated pricing for the sale of gas in Malaysia or for any other purpose.

B **[72]** It follows from the foregoing that the parties agreed, by virtue of the interim arrangement to the formula for the computation of the pricing or such prices as may be issued by the government of Malaysia or its representative, which includes the economic planning unit.

C **[73]** The defendant's complaint is that the pricing imposed by the plaintiff is inconsistent. To this end the defendant points to the fact that the price imposed on it in the invoices is RM17.392/GJ (gigajoule), whereas the prescribed tariff in the letter dated 9 September 2011 from the EPU is RM15.32/MMBTU. D The defendant also points to an earlier letter dated 31 May 2011 which sets the price at RM18.35 MMBTU. The defendant questions whether the EPU letter of 9 September 2011 supercedes the letter of 31 May 2011 in the absence of clear indication of the same.

E **[74]** The plaintiff responds by maintaining that it invoices the defendant according to government directives on the pricing of dry gas. The plaintiff points to the government directive dated 31 May 2011 which fixed the applicable price for the supply of dry gas to F the defendant as RM18.35/MMBTU with effect from 1 June 2011. The defendant subsequently made payments in respect of the invoices issued by the plaintiff. There were disputes. A meeting was held with the EPU who then issued the letter dated 9 September 2011. There is no dispute about the issuance of G these letters. *Vide* its letter dated 9 September 2011, EPU specifically addresses the legal dispute between the plaintiff and the defendant.

[75] A perusal of the letter of 9 September clearly sets out the H fact that the defendant had made an appeal for the price of dry gas supplied to it to be reduced to levels similar to that set for the electronic sector commencing 1 January 2009. Having set up a specific committee to study this which was headed by the Prime Minister it was decided that the defendant's plea to obtain dry gas I at this reduced price was rejected. As such the letter concludes

that the price of dry gas supplied by the plaintiff to the defendant is maintained at the industry sector price determined by the Cabinet, namely RM15.35 with effect from 1 March 2009.

[76] It would therefore appear that pursuant to the interim arrangement and the clear evidence of pricing as provided by the EPU (consonant with art. 10.2 of the interim arrangement) there is no inconsistency in relation to the price of dry gas supplied.

[77] Finally and in any event, it is not in dispute that the defendant has made payment to the plaintiff in respect of invoices issued by the plaintiff. I would concur with learned counsel for the plaintiff that given the chronology of dealing between the parties, the 2012 suit and the matters above that the defendant is estopped by its conduct from alleging that there is no agreement between the parties in respect of the applicable price for the dry gas.

[78] The issue of pricing therefore, also does not comprise a 'triable' issue.

Issue (6): The Plaintiff Has Acted In Contravention Of The Competition Act 2010 In Fixing The Price For The Supply Of Dry Gas To The Defendant.

[79] The defendant contends that it is an undisputed fact that the plaintiff is a statutory monopolist, as there is no other company in Malaysia that extracts and processes gas. The defendant further contends that as a monopolist the plaintiff abuses its dominant position by suspending the supply of gas (on two occasions) and insisting on the execution of a gas sales agreement which the defendant maintains is unreasonable, unfair, lopsided and in contravention of the Competition Act 2010. The defendant points to Chapter 2 which expresses a prohibition on the abuse of a dominant position.

[80] The defendant goes on to stipulate why the provisions of the proposed gas sales agreement is unfair and attempts to levy penalties and various other punitive provisions.

[81] It must be said that the current matter under adjudication does not relate to the execution of the proposed gas sales agreement but the recovery of monies due and owing to the plaintiff for dry gas already supplied and utilised by the defendant.

The alleged unfairness of the proposed provisions of the gas sales agreement is therefore not a matter for consideration in this case which deals entirely with a debt claimed by the plaintiff.

[82] The plaintiff responds to the defendant's contentions by pointing out that the price for the supply of dry gas was not fixed by the plaintiff itself but by way of government directive as has been discussed above. The question of the plaintiff therefore 'abusing' a dominant position does not arise.

[83] The plaintiff also submits that the Competition Act 2010 has no application to the present case. Section 13 of the Competition Act 2010 provides that the provision under Part II ie, the anti-competition provisions, shall not apply to matters specified in the second schedule, which provides:

> Activities not subject to Chapters 1 and 2 of Part II
>
> 13. Chapters 1 and 2 of Part II of this Act shall not apply to:
>
> (a) an agreement or conduct to the extent to which it is engaged in an order to comply with a legislative requirement;
>
> ...
>
> (c) an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibitions under Chapter 1 and Chapter 2 of Part II would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise.

[84] The defendant further submits that the plaintiff has not satisfied the requirement of compliance with 'legislative' requirement because EPU directives are not 'legislative' requirements.

[85] Having heard the competing submissions it appears to this court that it is clear that the plaintiff has complied with government directives in fixing a price for the supply of dry gas to the defendant. The entire business of the plaintiff is regulated *inter alia* by the Petroleum Development Act 1974. It is subject to the control and direction of the Prime Minister who may from time to time issue such direction as he may deem fit. To that extent the plaintiff falls within the ambit of (a) above. Further or alternatively the plaintiff falls within the purview of (c), as an enterprise entrusted with the provision of services.

[86] It would therefore appear that the plaintiff is excluded from the application of Part II of the Competition Act 2010 by virtue of the second schedule of the Act. The issue of an alleged contravention of the Competition Act 2010 therefore does not arise. This too does not comprise a 'triable' issue. For the same reasons it cannot comprise the basis for the defendant's counterclaim which seeks in essence damages for an alleged contravention of the Competition Act 2010. Accordingly such a counterclaim also cannot stand.

Conclusion

[87] Having considered the entirety of this matter it appears to this court that in relation to the debt sought to be recovered by the plaintiff the defendant has not raised any triable issues. As I concluded earlier, to my mind these defences raised by the defendant which were previously raised in the 2012 suit are caught by the doctrine of *res judicata* or issue estoppel. As such the defendant is estopped from raising these same defences in these proceedings which are subsequent proceedings, given that judgment in respect of the same issue was entered in respect of part of the plaintiff's claim in 2012 and as the defendant willingly compromised the balance of the claim as well. It therefore follows that the defendant has no defence to the plaintiff's claim herein. However even if I am incorrect in so concluding I have considered each and every limb of the proposed defence and counterclaim and considered that they afford no issues that require ventilation at trial. For these reasons I am satisfied that the plaintiff has established its claim *vide* this interlocutory application.

[88] However it is to be noted that the plaintiff seeks both penalty interest and further interest at the rate of 3.5% above the base lending rate as quoted by Malayan Banking Bhd until full payment. I can find no contractual basis to allow this portion of the claim which I therefore do not allow.

[89] Judgment is therefore entered for the plaintiff in the sum of RM146,138,690.52 as at 31 December 2012 together with interest at the rate of 4% from the date of judgment until the date of final settlement together with costs.

The Application For An Injunction

[90] *Vide* a separate enclosure the defendant seeks an order that:

(1) The plaintiff whether by themselves or Petronas Gas Bhd be restrained from reducing the supply of dry gas (C1/Methane) less than 42 mmscfd/1189 KSM3 per day (+-) and suspending or ceasing or interrupting the supply of dry gas to the defendant; and

(2) The plaintiff whether by themselves or Petronas Gas be ordered to restore supply of dry gas to the defendant's plant of not less than 42 mmscfd/1189 KSM3 per day (+-) with immediate effect.

[91] On 9 May 2013 the plaintiff gave notice to the defendant that the supply of dry gas to its plant would be suspended after 5pm on 15 May 2013 in the event payment in the sum of RM232,152,682.25 was not received in full for dry gas supplied up to 7 May 2013. The notice was issued pursuant to the interim arrangement dated 6 January 2012, more particularly cl. 11.10 of attachment A.

[92] Clause 11.10 provides as follows: 'In the event that the buyer fails to pay seller pursuant to art. 11.6 the amount due and payable after 30 days from the due date for payment thereby, seller may suspend delivery of dry gas until payment of such amount is received by seller in full by giving buyer seven days' notice in writing and the suspension shall take effect upon expiry of the said notice.'

[93] The plaintiff (through Petronas Gas Bhd) then reduced the supply of dry gas to the defendant by 50% with effect from 9 May 2013. The supply of dry gas was not however suspended completely from 15 May 2013.

[94] The defendant took objection to this reduction and threat to suspend supply completely maintaining that the very basis for the suspension comprised the subject matter of adjudication before this court. In other words the defendant maintained that the basis for such suspension, namely the interim arrangement was being seriously challenged in this suit. The defendant further maintains that the plaintiff is not entitled to pre-empt issues by reducing supply. Further the defendant also maintains that it is sub-judice for the plaintiff to act this way.

[95] The defendant points to the fact that far each day of the shut down of the plant the defendant suffers damages which run into the millions. On the last occasion of a suspension from 2 January 2012 to 7 January 2012 the defendant alleges it suffered losses of approximately RM13,777,240. It further points to the fact that it's contractual obligations to third parties would be severely affected by the unscheduled closing down of the plant which would become necessary if there was no gas supply. The defendant maintains that it has been in operation for about 30 years.

[96] It is submitted for the defendant that there are serious issues to be tried which require ventilation at trial. Further it maintains that the damage it is likely to suffer if the supply of gas is stopped completely is not compensable in damages. Therefore it seeks the injunction to maintain *status quo* pending the final disposal of the suit.

[97] The plaintiff in response submits that this is not an application for a prohibitory injunction but a mandatory injunction. In support of this submission the plaintiff points to the fact that the defendant in fact seeks an order for the plaintiff to do a positive act, namely activate the supply of gas to the defendant. Although the first prayer seeks that the plaintiff be 'restrained' from reducing the supply below a certain level this in fact amounts to seeking an order that the plaintiff restore full supply to the defendant, which is a positive act. As for the second prayer, that compels the plaintiff to restore supply which again is a positive act.

[98] The plaintiff relies on s. 53 of the Specific Relief Act 1950 which provides:

> When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

[99] A prohibitory injunction restrains the other party from doing a specific act. The test for grant of a prohibitory injunction is as set out *inter alia* in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & 2 Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193.

[100] A mandatory injunction compels the other party to perform a specific act or has the effect of requiring the respondent to undo an act done in the past (see *Pinsler*, vol. 2, Chapter XX, para 311). Accordingly the test for a prohibitory injunction is not the same as a mandatory injunction.

[101] I would concur with learned counsel for the plaintiff that the injunction sought is in fact a mandatory injunction, notwithstanding that it is couched or drafted in prohibitory form.

[102] The test for the grant of a mandatory injunction is that an unusually strong and clear case is to be made out such that the court must feel assured that a similar injunction would probably be granted after trial. In the Federal Court decision of *Tinta Press Sdn Bhd v. Bank Islam (M) Bhd* [1987] 1 CLJ 447; [1987] CLJ (Rep) 396; [1987] 2 MLJ 192 it was held as follows:

> The discretionary power of the court to grant a mandatory injunction is provided by s. 53 of the Specific Relief Act, 1950 (Act 137). By judicial process, the power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases as was held in *Wah Loong (jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok* [1975] 1 LNS 190 and confirmed by the Federal Court in *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1978] 1 LNS 184. The case must be unusually strong and clear in that the Court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result (see *Gibb & Co v. Malaysia Building Society Bhd* [1982] 1 MLJ 271, 273 and *Shepherd Homes Ltd v. Sandham* [1971] 1 Ch 340, 349).

[103] In the instant case the grant of the injunction sought, particularly prayer two would amount to granting the defendant the entire relief sought by it. It is therefore incumbent upon the defendant to effectively prove its case or at least make out a very strong case in its favour.

[104] From my judgment in relation to the summary judgment application it is evident that I have concluded that there are no issues that require ventilation at trial. There are therefore no

serious issues to be tried for the reasons I have set out in relation to that application. Of particular relevance to this application is the fact that I have concluded that the interim arrangement remains valid and subsisting beyond 20 January 2012. It continues to prevail. By virtue of the interim arrangement which includes attachment A, the plaintiff is entitled, pursuant to both cl. 4 as well as art. 11.10. On those grounds alone the defendant is not entitled to the injunction sought. If I am incorrect in concluding that there are no serious issues to be tried, I am still satisfied that the damage suffered by the defendant is compensable in damages.

[105] Even if the interim arrangement does not subsist (as I have concluded above), a question that arises for consideration is whether the plaintiff is bound to continue to supply dry gas for an infinite period notwithstanding the failure of the defendant to make payment for dry gas that has been supplied and consumed. In other words, is the defendant entitled to require a continued and full supply of gas despite its undisputed failure to pay sums in the region of RM146 million as of 31 December 2012 and 232 million odd to date?

[106] The defendant maintains that the plaintiff is duty bound to make such supply pursuant to the provisions of the Gas Supply Act 1993, more particularly s. 14. That section reads:

> 14(a) Subject to the following provisions of this Part and any regulation made under this Act, a licensee shall upon being required to do so by the owner or occupier of any premises situated within the area of supply of gas –
>
> (a) give a supply of gas to those premises; and
>
> (b) provide all things as may be reasonably necessary for that purpose

[107] The plaintiff meets this contention by pointing out that the Gas Supply Act 1993 has to do with end-consumers and not the defendant as borne out by s. 1(3). Section 1(3) provides that:

> This Act shall apply to the supply of gas to consumers through pipelines -
>
> (a) Downstream of the last flange of the city gate station; or
>
> (b) From the filling connection of a storage tank or cylinder specifically used for reticulation or delivery of gas to any apparatus in any premises.

[108] It would appear that this Act is not applicable to the defendant. Neither does it make provision for the endless supply of dry gas without consideration for an infinite period of time. I cannot therefore concur that there is a statutory duty on the part of the plaintiff to continue supplying dry gas without consideration. To my mind this is simply not tenable.

[109] I have considered the defendant's further contentions that there would be considerable and irreparable loss in the form of loss of profits and default on third party contracts. However although these matters assuredly give rise to serious problems for the defendant, do not merit, on the factual matrix of this case the warrant or grant of a mandatory injunction as sought by the defendant. What is apparent here is that there is a debt due and owing by the defendant to the plaintiff. As stated before there is also a contractual provision allowing for the suspension of gas.

[110] If it is said that the interim arrangement does not subsist, then it would follow that there is no agreement in place between the plaintiff and the defendant. As such there would be no duty or obligation on the part of the plaintiff to supply dry gas, in the absence of any contractual requirement. As I have stated above, there is no statutory duty under s. 14 of the Gas Supply Act 1993 either, as that Act is simply not applicable to the plaintiff and the defendant.

[111] It is pertinent that the defendant has not afforded any undertaking as to damages although in the course of the hearing learned counsel indicated that an undertaking would be made if required by the court. Given the defendant's inability to meet the debt due to the plaintiff, any undertaking given would not be viable unless fortified.

[112] Applying the test in *Tinta Press Sdn Bhd v. Bank Islam (M) Bhd* (above), I am satisfied that the defendant has not made out a strong case and therefore dismiss the application for an injunction on the terms sought by the defendant.

[113] In conclusion therefore, the plaintiff's application for summary judgment is concerned the plaintiff is granted an order in terms of prayer (a) only of encl. 4 together with post judgment interest of 4% per annum until date of settlement and costs of

RM20,000. The counterclaim also stands dismissed in view of my conclusion that the provisions of the Competition Act 2010 are not applicable in the instant case.

[114] The defendant's application for an injunction is dismissed.